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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	:	Chapter 11
Circuit City Stores, Inc., et al.,	:	Case No. 08-35653(KRH)
Debtors.	:	Jointly Administered

DEBTORS' OBJECTION TO MOTION FOR ORDER REMOVING THE CAP ON FEES IMPOSED BY THIS COURT'S JANUARY 20, 2009 RETENTION ORDER AUTHORIZING THE EMPLOYMENT OF GOWLING LAFLEUR HENDERSON LLP AS CANADIAN COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

The debtors and debtors in possession in the above-captioned jointly administered cases (collectively,

the "Debtors")[1] hereby submit this objection (the "Objection") to the Motion For Order Removing The Cap On Fees Imposed By This Court's January 20, 2009 Retention Order Authorizing The Employment Of Gowling Lafleur Henderson LLP As Canadian Counsel To The Official Committee Of Unsecured Creditors (the "Motion") (Docket No. 7526). In support of this Objection, the Debtors respectfully state as follows:

BACKGROUND

A. The Debtors' Bankruptcy Cases And The Canadian Debtors' Insolvency Cases.

1. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc.(6796), Sky Venture Corp. (0311), Prahs, Inc.(n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courcheval, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is For all other Debtors, the address was 9950 Mayland Drive, Richmond, Virginia 23233 and currently is 4951 Lake Brook Drive, Glen Allen, VA 23060.

(the "U.S. Proceedings"). On that same day, in conjunction with the U.S. Proceedings, InterTAN Canada, Ltd. ("InterTAN") and Tourmalet Corporation (together, the "Canadian Debtors"), applied for protection from their creditors in Canada pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA") (the "Canadian Proceedings") in the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court").

2. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases. Similarly, in connection with the commencement of the Canadian Proceeding, the Canadian Court issued an "initial order" pursuant to which it, inter alia, appointed a monitor.

3. As this Court is well aware, on January 16, 2009, the Debtors began liquidating their assets and, since then, have been winding up their remaining affairs. As part of that process, on or about March 10, 2009, the

Canadian Court entered an Order approving the sale of substantially all of the assets of InterTAN to 4458729 Canada Inc., a subsidiary of Bell Canada. And, on or about March 20, 2009, this Court entered an Order (Docket No. 2711) approving the sale.

4. On or about June 30, 2009, the Canadian Debtors closed the sale of substantially all of their assets and businesses and have been working to conclude the claims process, with the expectation that there will be sufficient proceeds from the sale to provide a substantial equity distribution to the Debtors for the benefit of their creditors, although such outcome is not assured.

5. Since then, the Debtors and the Canadian Debtors have been working to maximize the value of the Debtors' potential equity distributions in the Canadian Proceedings and the potential recovery to the Debtors' estates from the repatriation of such distributions.

B. The Joint Plan of Liquidation.

6. On September 24, 2009, the Debtors and the Committee filed the First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its

Affiliated Debtors and Debtors In Possession and its Official Committee of Creditors Holding General Unsecured Claims (as amended, the "Plan"). Generally, the Plan provides for the liquidation of the Debtors' remaining assets and distributions to creditors through a liquidating trust (the "Liquidating Trust").

7. The disclosure statement (the "Disclosure Statement") filed with respect to the Plan was approved on September 24, 2009.

8. No confirmation hearing has been held with respect to the Plan, and the Plan has not yet been confirmed.

B. The Retention of Gowlings.

9. On December 22, 2008, the Committee filed its Application For Entry Of An Order Authorizing And Approving The Employment Of Gowling Lafleur Henderson LLP ("Gowlings") As Canadian Counsel To The Official Committee Of Unsecured Creditors Nunc Pro Tunc To November 18, 2008 (the "Application") (Docket No. 1197).

10. In the Application, the Committee sought to retain Gowlings as its Canadian counsel to advise it with respect to the Canadian Cases. Specifically, the

Committee sought to retain Gowlings for the following services:

- Representing the Committee in the Canadian Proceedings and any other related proceedings;
- Assisting the Committee and its advisors in analyzing the Debtors from a Canadian perspective and, if required, in negotiating with the Debtors;
- Assisting with the Committee's investigation of the assets, liabilities, and financial condition of the Canadian Debtors;
- Assisting the Committee's advisors from a Canadian perspective in their analysis of, and negotiations with, the Debtors or any third party concerning matters related to, among other things, formulating the terms of a plan or plans of reorganization for the Debtors;
- Assisting and advising the Committee's advisors with respect to any matters that they may request involving issues of Canadian law or practice;
- Reviewing and analyzing all pleadings, orders, statements of operations, schedules, and other legal documents in the Canadian Proceedings and any other proceedings in Canada related to the Debtors or their property, assets or businesses;
- Preparing, on the Committee's behalf, any pleadings, orders, reports and other legal documents as may be necessary in furtherance of the Committee's interests and objectives regarding Canadian matters; and

- Performing all other legal services as described by the Committee and its advisors which may be desirable, necessary and proper for the Committee to discharge its duties in the U.S. Proceedings.

11. On January 9, 2009, the Debtors filed their objection to the Application (the "Objection") (Docket No. 1450).

12. On January 20, 2009, this Court entered an agreed order (the "Retention Order") (Docket No. 1667) resolving the Objection and approving Gowlings' retention subject to certain agreed upon terms and conditions. Pursuant to the Retention Order, the Committee was permitted to retain Gowlings as its Canadian counsel, retroactive to November 18, 2008, for the services sought by Gowlings in the Application. As part of the agreement with the Debtors, the Retention Order established a cap on the compensation and reimbursement of Gowlings at the amount of $150,000 (the "Cap Amount"), and required the Committee to seek additional authorization for any expenditures above the Cap Amount.

C. Gowlings' First Fee Application.

13. On December 14, 2009, after over one year of being retained, Gowlings filed its First Interim

Application for compensation for services rendered as Canadian counsel to the Committee (the "First Fee Application") (Docket No. 6075), seeking approval and payment of compensation for services provided to the Committee from November 18, 2008 to October 31, 2009 (the "First Fee Period"). Thereafter, on January 27, 2010, the Court entered its Order Allowing Interim Compensation and Expense Reimbursement of Gowling Lafleur Henderson LLP (Docket No. 6375), approving payment to Gowlings of $104,456 in fees and $749.65 in expenses.

14. To date, Gowlings has not filed any other interim fee applications and has not served any monthly invoices in accordance with the Court's Order Under Bankruptcy Code Sections 105(a) And 331 Establishing Procedures For Interim Compensation (the "Interim Compensation Order") (Docket No. 830).[2]

D. Events Subsequent to First Fee Period.

15. In or about late October 2009, the Debtors

[2] As part of the Debtors' attempt to resolve issues regarding the present matter consensually, the Debtors requested and obtained invoices from Gowlings, but having failed to resolve a number of outstanding issues with the Committee reserved all rights with respect to objections thereto.

informed the Committee that proceeding to confirmation of the plan of liquidation in November of 2009, as then scheduled, could adversely affect the repatriation of the equity proceeds from InterTAN through possible negative Canadian tax consequences. As a result, the Debtors and the Committee determined to delay the hearing on the confirmation of the Plan to attempt to address the Canadian tax issues.

16. Confirmation was delayed, in part, to allow the Canadian Debtors, their professionals, and the Canadian monitor to pursue an advance tax revenue ruling from the Canadian Revenue Administration (the "CRA"), which, if issued, would limit Canadian taxes that may otherwise be attributable to any equity distribution. In connection therewith, in or about November 2009, the Committee requested that Gowlings become involved with the analysis of the Canadian tax issues. After Gowlings had an opportunity to review the issues, all parties agreed to submit a request for the proposed ruling. That proposed ruling did not initially request a ruling on whether the Liquidating Trust would impact the CRA's analysis.

17. In February 2010, the CRA provided the Canadian Debtors with a draft revenue ruling (the "Draft Ruling") that was consistent with the Canadian Debtors' submissions. The Canadian Debtors, the Debtors, and the Committee all reviewed the Draft Ruling, and the Canadian Debtors and Debtors were prepared to request that the CRA issue the formal ruling, which ruling would have been issued within a week or so later. Gowlings and the Committee, however, requested that the Draft Ruling be revised to take into account the formation of a the Liquidating Trust upon confirmation of the Joint Plan.

18. Although the Canadian Debtors and the Debtors disagreed with this approach because of the fear that it might delay the ruling process, the Canadian Debtors and the Debtors agreed to proceed with Gowlings and the Committee's recommendation. As a result, Gowlings took it upon itself to prepare a modified ruling request and a memorandum explaining, among other things, the nature of the Liquidating Trust and the Liquidating Trustee's anticipated role. The modified ruling request has not been approved, and the CRA requested some additional information.

19. On April 20, 2010, the Committee informed the Debtors via e-mail that, despite the Cap Amount set forth in the Retention Order, Gowlings accrued fees of approximately $450,000 to date -- approximately three times the Cap Amount -- of which $345,000 accrued from November 1, 2009 to April 20, 2010 on account of Gowlings' work on the Canadian tax issues. The Committee requested that the Debtors immediately agree to a proposed consent order removing the Cap Amount from the Retention Order. The Debtors did not agree to do so, but sought to review Gowlings' invoices and to resolve the Gowlings matter in the context of finally resolving a number of other outstanding issues, some of which bear on prosecution of the Joint Plan. Unfortunately, to date the issues have not been resolved.

20. On May 12, 2010, the Committee filed the Motion seeking to remove the Cap Amount and eliminating the Cap Amount as a basis for objecting to the fees and expenses incurred by Gowlings for period November 1, 2009 to March 31, 2010 and all fees and expenses incurred by Gowlings from and after April 1, 2010.

OBJECTION

21. By this Objection, the Debtors request that this Court deny the Motion and thereby enforce the Cap Amount with respect to any fees billed or expenses incurred on or prior to April 20, 2010. In addition, although the Debtors do not object to the scope of Gowlings' retention being expanded to include tax related matters with respect to services rendered after April 20, 2010, the Debtors request that this Court direct Gowlings to provide the Debtors and the United States Trustee a budget for such work and then set a cap either consented to by the Debtors and the United States Trustee or approved by this Court.

BASIS FOR OBJECTION

22. By its own admission, in November 2009 -- more than six months ago, the Committee requested that Gowlings become involved with the analysis of the Canadian tax issues related to the repatriation of equity proceeds of the sale of InterTAN (the "Tax Services"). Motion at 7 (stating that, in November 2009, the Committee requested that "Gowlings investigate the nature and extent of the Canadian tax concerns and work with the

Debtors' [and the Canadian Debtors'] various professionals to develop a solution allowing for plan confirmation to proceed and the [InterTAN] equity proceeds to be distributed to the Debtors in a tax efficient manner"). The Committee admits that the Tax Services were not part of the scope of services for which Gowlings was originally retained under the Retention Order. Motion at 8 (stating that the Cap Amount was set when "it was anticipated that Gowlings' work would be limited to monitoring the InterTAN Canada sale process and Canadian insolvency proceedings" and admitting that the "scope of Gowlings' services to the Committee expanded significantly" due to the "Canadian tax issues"). Thus, by the Committee's own admission, Gowlings was not previously retained to provide the Tax Services. Consequently, the Committee was required to obtain this Court's prior approval before expanding the scope of Gowlings' retention and burdening the Debtors' estate with additional fees.

23. Through the Motion, the Committee is thus seeking to retroactively expand the scope of Gowlings' retention. The Debtors submit that it is inappropriate

in these circumstances to grant the Committee's requested relief.

24. Moreover, even assuming that Gowlings' scope of services in the Retention Order did include the Tax Services, by requesting that this Court remove the Cap Amount, the Committee is nonetheless seeking to retroactively retain Gowlings, albeit on different terms. Again, the Committee was required to seek this Court's pre-approval to change the terms of Gowlings' fee relationship. Specifically, the Committee was required to seek this Court's approval to increase (or remove) the Cap Amount before Gowlings exceeded the Cap Amount. Indeed, the Retention Order plainly provided as much. Retention Order at 3 (stating that the Committee can "seek additional authorization for expenditures above the Cap Amount in the future").

25. Instead, the Committee requested that the Debtors (and now this Court) consent to increasing (and removing) the Cap Amount only after Gowlings incurred fees and expenses well in excess of the Cap Amount. Again, the Debtors submit that it is inappropriate in

these circumstances to grant the Committee's requested relief.

26. Finally, because Gowlings did not, and has not, complied with the Interim Compensation Order, the Debtors maintain that any expansion of Gowlings' retention to include Tax Services rendered after April 20, 2010 should be expressly conditioned upon Gowlings providing the Debtors and the United States Trustee with an estimated budget for future services, which budget will be used to set a cap for future fees and services that Gowlings may not exceed without prior Court approval.

APPLICABLE AUTHORITY

I. GOWLINGS' RETENTION MAY NOT PROPERLY BE EXPANDED RETROACTIVELY.

A. Standard For Retroactive Retention.

27. Under Bankruptcy Code section 1103(a), a creditor's committee is permitted to employ professional persons "with the court's approval." 11 U.S.C. § 1103(a). This provision parallels Bankruptcy Code section 327(a), which permits the trustee to employ professional persons "with the court's approval." See 11 U.S.C. § 327(a). Federal Rule of Bankruptcy Procedure 2014(a) provides

than an "order approving the employment" of professional persons "shall be made only on application of the trustee or committee[.]" Fed. R. Bankr. P. 2014(a).

28. In construing these provisions, courts have consistently held that "retention of a professional must be approved by the court in advance of the services to be performed." In re Renaissance Residential of Countryside, LLC, 423 B.R. 848, 858 (Bankr. N.D. Ill. 2010) (emphasis added). This pre-approval requirement applies not only for trustees and debtors under Bankruptcy Code section 327(a), but also for committees under Bankruptcy Code section 1103. See In re Arkansas Co., 55 B.R. 384, 385 (D. N.J. 1985) (discussing official committee's failure to seek court approval before work, which was "required by 11 U.S.C. § 1103 and other sections of the Bankruptcy Code"); see also In re Fleeman, 73 B.R. 579, 582 (Bankr. M.D. Ga. 1987) (denying compensation for counsel to unsecured creditors' Committee for "professional services rendered prior to his court appointment"). Indeed, as this Court recently concluded, "[a] professional who performs services . . . without first securing an order approving employment will

be treated as a volunteer notwithstanding that the services rendered may have been beneficial to the bankruptcy estate." In re Rennie Petroleum Corporation, 384 B.R. 412, 415 (Bankr. E.D. Va. 2008) (Huennekens, J.).

29. Upon a showing of "extraordinary circumstances", however, a court "may permit retroactive employment[.]" In re Southeastern Materials, Inc., Case No. 09-52606, 2010 WL 521121, *1 (Bankr. M.D.N.C. Feb. 12, 2010) (emphasis added); see also In re Torrence Company, Inc., Case No. 067-30637, 2007 Bankr. LEXIS 167, *4 (Bankr. E.D. Va. Jan. 11, 2007) ("Retroactive employment can be authorized only when" extraordinary circumstances exist). This Court generally applies a two-part test to determine whether "extraordinary circumstances" exist. Rennie, 384 B.R. at 416 (discussing a "two-part test for determining when extraordinary circumstances would permit retroactive employment"). "That test requires (1) the professional to satisfactorily explain the failure to obtain prior approval of employment and (2) the professional to meet the requirements set forth in § 327 and Rule 2014(a), aside from that of obtaining timely court appointment." Id. (citing In re Tidewater

Memorial Hospital, Inc., 110 B.R. 221, 226 (Bankr. E.D. Va. 1990)); see also Torrence, 2007 Bankr. LEXIS 167 at *4; In re Tamojira, Inc., 210 B.R. 702, 706 (Bankr. E.D. Va. 1995). In certain circumstances, this Court has also considered additional factors: "(3) whether notice was provided to creditors and other parties in interest, (4) whether there are objections to retroactive entry of the order, and (5) whether harm will befall the estate or other parties in interest." In re Don's Trucking, Inc., Case No. 96-36286-S, 1997 WL 33807881, *2 (Bankr. E.D. Va. Sep. 29, 1997).

30. Finally, the proponent of the motion for retroactive approval, here, the Committee, "bears the burden to establish that the test has been met." Rennie, 384 B.R. at 416.

B. The Committee Has Failed To Meet Its Burden To Establish That Extraordinary Circumstances Exist.

31. As previously discussed, the Committee admits that the Tax Services were not part of the scope of Gowlings' retention under the Retention Order. Despite the limits on Gowlings' retention, the Committee requested that Gowlings provide the Tax Services without

seeking the Court's approval for such expanded retention in advance. Through the Motion, the Committee is seeking to expand the scope of services and remove the Cap Amount almost six months after Gowlings started performing the Tax Services and after Gowlings already exceeded the Cap Amount. Thus, the Committee is seeking this Court's retroactive approval of the retention of Gowlings for the Tax Services.

32. As set forth above and discussed below, to do so, the Committee must satisfy five factors. The Committee has not, and cannot do, demonstrate that these factors are satisfied.

1. Gowlings has not satisfactorily explained its failure to seek prior Court approval.

33. To date, neither Gowlings nor the Committee has provided a satisfactory explanation for Gowlings' failure to obtain prior court approval of the Tax Services. In the Motion, the Committee argues that "changed circumstances necessitated an increase in the scope of services the Committee has requested that Gowlings render in connection with resolution of important Canadian tax issues . . . ." Motion at 6.

This does not, however, address why neither the Committee nor Gowlings sought a court order approving Gowlings' retention for the Tax Services in November 2009, when the Committee first realized these changed circumstances and requested that Gowlings perform the Tax Services. Nor does it address why Gowlings and the Committee waited an additional six months, until after Gowlings generated fees and expenses well in excess of the Cap Amount, to request that the Court remove the Cap Amount. Thus, the Court must conclude that there is no satisfactory explanation for the Committee's failure to make a timely request to either expand Gowlings' services or raise the Cap Amount. See, e.g., Southeastern Materials, 2010 WL 521121 at *1-2 (no satisfactory explanation where debtor waited 33 days to file an application for employment); Don's Trucking, 1997 WL 33807881 at *2 (finding that special counsel "has not satisfactorily explained why there has been such a large gap between the time she commenced working, and the time she sought approval from this Court" where the professional waited over a month to seek retroactive approval).

34. Nor is a satisfactory explanation provided by the Committee's assertion that "Gowlings has provided valuable services to the Committee that has materially enhanced the Debtors' and Committee's ability to move forward with the confirmation of the Plan." Motion at 8. While the Debtors may well dispute the benefits of the services provided by Gowlings,[3] the fact that some benefit may have been conferred on the Debtors, the Committee or the estates does not establish a satisfactory explanation for the Committee's failure to obtain prior court approval. See, e.g., Torrence, 2007 Bankr. LEXIS 167 at *5 ("The court does not question that the services rendered by [counsel] were beneficial to the debtor" but "it is impossible for the court to find satisfactory counsel's explanations for failure to timely file an employment application.").

35. As admitted by the Committee, "Gowlings recognizes that it should have promptly informed the

[3] As discussed above, Gowlings and the Committee elected to proceed with a process in Canada that has not yielded any revenue ruling from the CRA. All revised rulings that have been submitted have been met with considerable resistance and have required additional analysis by all parties and the CRA. More importantly, perhaps, at this point, there is no assurance that the CRA will issue the revised ruling that Gowlings has prepared.

Committee when it exceeded the Cap Amount so that the Committee could seek further Court authorization for amounts in excess of the Cap Amount." Motion at 8. The fact that Gowlings was aware that it needed to seek court approval, yet failed to do so or inform the Committee until months afterwards, further indicates the lack of a satisfactory explanation.

36. Indeed, in Don's Trucking, this Court found against a satisfactory explanation in similar circumstances. 1997 WL 33807881 at *2. In finding no satisfactory explanation, the court noted that the special counsel "ignored her duty to communicate with Debtor's counsel until being notified" of court approval requirements, "more than a month elapsed between that explicit notification and the filing of the application," and it was "Debtor's counsel, not [special counsel], who eventually sought approval for her application." Id. Based on the foregoing, the court found "negligence [that] does not excuse the failure to seek court approval for employment." Id.

37. For these reasons, Gowlings and the Committee have failed to satisfy the first element.

2. Gowlings has failed to meet the requirements set forth in Rule 2014(a).

38. While the Debtors do not contest that Gowlings meets the requirements set forth in Bankruptcy Code section 327 aside from the failure to timely obtain the Court's approval for Gowlings to provide the Tax Services, Gowlings has failed to meet two important requirements of Bankruptcy Rule 2014(a) -- an application identifying the change in approved scope of Gowlings' services and the change in the nature of Gowlings' fee arrangement. See Fed. Bankr. R. 2014(a). Specifically, since November 2009, Gowlings and the Committee failed to disclose to the Debtors, other parties in interest, and the Court that Gowlings had not been previously retained to provide Tax Services and that the Committee would seek an alternate fee arrangement with the Gowlings.

39. Moreover, with respect to Gowlings' fee arrangement, in mid-December, the Committee was put on notice when Gowlings filed the First Interim Fee Application that Gowlings fee arrangement may need to be altered. Yet, neither the Committee nor Gowlings took any action for more than four months after the First

Interim Fee Application was filed. In addition, Gowlings compounded the problem by not submitting monthly invoices in accordance with the Interim Compensation Order.

40. Accordingly, the Committee and Gowlings have failed to satisfy the second element.

3. Gowlings did not provide notice to creditors and other parties in interest.

41. Gowlings failed to provide notice to the Debtors, creditors, and other parties in interest that the Tax Services exceeded the scope of its original retention. Indeed, the Committee even acknowledges that Gowlings waited until April 2010, almost six months after originally being requested to provide the Tax Services, to notify the Committee that it had exceeded the scope of its original retention. See Motion at 5 ("In the middle of April 2010, Gowlings informed the Committee that it had exceeded the Cap Amount"). And it was at that time that the Committee first informed the Debtors.

42. Accordingly, Gowlings and the Committee have failed to satisfy the third element.

4. The Debtors have objected to Gowlings' retroactive retention.

43. By this Objection, the Debtors are objecting to the Motion. Consequently, Gowlings and the Committee have failed to meet the fourth element.

5. Retroactive retention of Gowlings will harm the Debtors' estates and parties in interest.

44. If the Motion were granted, the Debtors, their estates, and parties in interest will be prejudiced. Gowlings and the Committee waited until six months after Gowlings started to perform the Tax Services to file the Motion and notify the Debtors and other parties in interest that the Tax Services exceeded the scope of Gowlings' original retention. By that point, Gowlings had generated fees and expenses approximately three times the Cap Amount without this Court's approval or the Debtors' consent.

45. If the Motion were granted, the Debtors' estates will be liable for these fees and expenses, which were not expected. Indeed, during the almost year-long First Fee Period, Gowlings only generated approximately $105,000 in fees and expenses, yet generated approximately $345,000 in the six months since November 2009 on account of the Tax Services. Consequently, the

Debtors could not have reasonably expected that Gowlings would incur approximately $345,000 during half the time period it took Gowlings to incur $105,000.

46. Moreover, the inability to enforce the Retention Order and Cap Amount after they have already been violated will result in forcing the Debtors' estates to sustain such costs, diminishing the value of their estates and thus the potential recovery of parties in interest. While the Committee asserts in the motion that the Debtors and other parties may "object to the allowance and payment of fees and expenses" on grounds other than the Cap Amount, Motion at 7, such parties will still be harmed by having to sustain the burden of objecting to the individual elements of Gowlings' fees and expenses, after the fact, rather than being able to enforce the Retention Order and Cap Amount previously set by this Court.

47. Moreover, the pre-approval requirement is "designed so as to permit parties in interest to understand . . . the extent to which the estate may be depleted by the employment of the proposed professional." Rennie Petroleum, 384 B.R. at 417. Pre-approval "affords

the Court as well as parties in the case the opportunity to assess the wisdom or propriety of using estate assets in the manner proposed." Id. at 416. If the Motion is granted, however, the Debtors and parties in interest will be deprived of these safeguards as to the retroactively approved Tax Services.

48. Accordingly, Gowlings and the Committee have failed to satisfy the fifth and final element. As a result, the Motion should be denied.

II. INCREASING OR REMOVING THE CAP AMOUNT SHOULD NOT BE RETROACTIVELY APPROVED.

49. Even if the Tax Services were part of Gowlings' original employment scope, the Committee would still have been required to seek pre-approval to increase the Cap Amount. In that regard, the terms of a retained professional's compensation are governed by Bankruptcy Code section 328(a), which provides that professionals may be retained "on any reasonable terms and conditions of employment" as long as it is done "with the court's approval." 11 U.S.C. § 328(a). The Court may approve compensation of such professionals, after notice and a

hearing, either on a final or interim basis. See 11 U.S.C. §§ 330, 331.

50. Pursuant to these provisions, courts have generally denied compensation to professionals who fail to obtain prior court approval. "A professional person may be compensated from the bankruptcy estate in a Chapter 11 case only if the professional's employment was properly authorized by the court pursuant to 11 U.S.C. §§ 327 or 1103." Rennie, 384 B.R. at 415; see also Torrence, 2007 Bankr. LEXIS 167 at *2-3 ("when read together, §§ 330, 327 and Rule 2014(a) clearly require that in order for an attorney or other professional to be awarded fees or costs . . . the attorney or professional's employment must have been previously approved by the bankruptcy court . . . ."); (citations omitted); Tidewater, 110 B.R. at 224 (Bankr. E.D. Va. 1990) ("an attorney or other professional may not be compensated in a bankruptcy case unless appointed by order of the court").

51. This general rule has a narrow and limited exception. Indeed, as is the case with retroactive retention, "[t]he court may . . . award retroactive fees and costs when 'extraordinary circumstances' exist."

Torrence, 2007 Bankr. LEXIS at *3; see also Rennie, 384 B.R. at 416 ("courts may award compensation notwithstanding the failure to comply with the clear requirements of § 327 of the Bankruptcy Code, but only in extraordinary circumstances"). The factors governing whether "extraordinary circumstances" exist for purposes of awarding retroactive fees and costs are the same as for retroactively approving retention of professionals. See, e.g., Torrence, 2007 Bankr. LEXIS at *3-5 (denying counsel's application for retroactive fees and costs because of failure to meet the extraordinary circumstances test); Tidewater, 110 B.R. at 226-29 (denying law firm's application for retroactive compensation due to failure to meet the extraordinary circumstances test).

52. By the Motion, the Committee is asking the Court to remove the Cap Amount set in the Retention Order and to eliminate the Cap Amount as a basis for objecting to the fees and expenses that Gowlings already generated, in excess of the Cap Amount, through its provision of the Tax Services. Such relief will retroactively alter the fee structure that was approved in the Retention Order,

as parties may no longer rely on the Cap Amount as a basis for objecting to the fees and expenses generated by Gowlings in excess of the Cap Amount. This is tantamount to retroactive approval of the fees and expenses generated by Gowlings in excess of the Cap Amount.

53. For substantially similar reasons to those discussed above in regard to retroactive retention, neither the Committee nor Gowlings have satisfied the five elements necessary to establish the existence of extraordinary circumstances. Accordingly, the Motion should be denied.

III. THE COURT SHOULD SET A NEW CAP AMOUNT AND RELATED RESTRICTIONS.

54. Bankruptcy Code section 328(a) provides in relevant part that, "a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person . . . on any reasonable terms and conditions of employment . . . ." 11 U.S.C. § 328(a). Under this provision, "courts have recognized their ability to alter the terms and conditions of a professional retention agreement prior to the 'conclusion of such employment.'"

In re Gander Mountain, Inc., 202 B.R. 613, 614 (Bankr. E.D. Wisc. 1996); In re Allegheny International, Inc., 100 B.R. 244, 246 (Bankr. W.D.Pa. 1989) ("Although section 328(a) specifically refers to altering professional compensation 'after the conclusion of such employment,' it would be absurd to conclude that we must wait until the conclusion of such employment, when the court realizes that it has acted improvidently in approving the terms and conditions of such employment").

55. In addition, Bankruptcy Code section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). This section "authorizes the courts to use fee caps" on the compensation of professionals. Gander, 202 B.R. at 614 (setting "caps for all professionals seeking employment and/or payment pursuant to 11 U.S.C. §§ 327-330" which "shall not be exceeded without prior court order"). Moreover, the Court may require professionals to perform in accordance with budgets. See, e.g., In re Pilgrim's Pride Corp., 407 B.R. 211, 214, 222 (Bankr. N.D. Tex. 2009) (court requested that ad hoc shareholders group

"propose a budget for an official committee of equity holders" after which it determined a budget on the committee's expenses).

56. Here, the Debtors submit that a new fee cap and budget are appropriate given that Gowlings provided the Tax Services for which it was not previously retained, incurred fees nearly three times the Cap Amount without this Court's approval, and failed to file monthly fee applications in accordance with the Interim Compensation Procedures.

57. Accordingly, the Debtors do not object to the scope of Gowlings' retention being expanded to include Tax Services rendered after April 20, 2010, but request that the Court (i) require Gowlings to provide the Debtors and the United States Trustee with a budget for its future fees and expenses; (ii) set a cap on future fees and expenses at an amount that is either (x) consented to by the Debtors and the United States Trustee or (y) fixed by the Court; and (iii) require Gowlings to submit monthly invoices in accordance with the Interim Compensation Order no later than 45 days following month end.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court (i) sustain this Objection, (ii) deny the Motion and (iii) grant the Debtors such other and further relief as is just and proper.

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